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May 27, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma*, CC Dkt. No. 97-121

Dear Mr. Caton:

Enclosed for filing please find an original and twelve copies of Southwestern Bell's Reply to Comments on Its Application for Provision of In-Region, InterLATA Services in Oklahoma, and Opposition to Petitions to Deny. The applicants are submitting separately certain confidential materials under seal, pursuant to 47 C.F.R. § 0.459. Parties wishing to review these materials may do so pursuant to the Commission's Protective Order in this Docket.

Consistent with the FCC's Public Notice, electronic versions of the Reply and the supporting affidavits are being submitted in Wordperfect 5.1 format. The conversion of these documents to WordPerfect 5.1 format from their original formats (including Microsoft Word) may result in difficulties for those seeking to access the material from the FCC's home page. Southwestern Bell will upload the brief and all supporting affidavits to its home page (http://www.sbc.com) in their original formats.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Yours sincerely,

Austin C. Schlick

Austin C. Schlick

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma	CC Docket No. 97-121

To: The Commission

SOUTHWESTERN BELL'S REPLY TO COMMENTS ON ITS APPLICATION FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN OKLAHOMA, AND OPPOSITION TO PETITIONS TO DENY

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INTRODUCTION AND SUMMARY

A great many comments have been filed on Southwestern Bell's application for interLATA authority in Oklahoma. Those comments are full of legal contentions and factual allegations. Despite the wide array of arguments, however, this is not a complicated case. After hearings and on-site investigation, the Oklahoma Corporation Commission ("OCC") concluded that local markets in its State are open to competition and that approving Southwestern Bell's application would increase local as well as long distance competition and serve the public interest. This Commission should not override the OCC's determinations about matters squarely within its expertise except upon the most persuasive showing. In judging this matter, moreover, the Commission must keep in mind five basic, undisputed facts.

First, the 1996 Act removed all legal restrictions barring entry by competitors into local markets in Oklahoma.

Second, pursuant to the 1996 Act, Southwestern Bell has negotiated with dozens of competitors in Oklahoma regarding interconnection, resale, and access to Southwestern Bell's local facilities and services. Southwestern Bell has signed nearly a score of interconnection and resale agreements, of which eight have now been approved by the OCC. All of these agreements were reached to the satisfaction of the competitor through voluntary negotiation and without any intervention by the OCC. Not a single competitor requested mediation with Southwestern Bell and only one carrier, AT&T, has taken its negotiating positions to arbitration.

Third, notwithstanding the abundance of unsupported allegations in these proceedings, no competitor has asked the OCC to find Southwestern Bell in violation of its duties under the local competition provisions of the 1996 Act.

Fourth, Southwestern Bell has taken the additional step of filing a Statement of Generally Available Terms and Conditions for Oklahoma ("Statement"), which is now in effect. This comprehensive set of terms and conditions allows any carrier to enter the local telephone business in Oklahoma without the need for carrier-specific negotiations.

Fifth, the OCC's determinations followed a public proceeding, open to all, which included hearings, compilation of a voluminous record, and field investigations regarding Southwestern Bell's compliance with the checklist and other requirements of section 271. Based on its analysis of the record evidence and its knowledge of Oklahoma's markets, the OCC made specific factual and legal findings, which included:

- Southwestern Bell is eligible for interLATA entry under "Track A" of section 271(c)(1) because Brooks Fiber provides business and residential local telephone service, has committed itself under state law to offering such service to all customers on a facilities basis, and has the capability of filling that commitment;
- Southwestern Bell has satisfied the competitive checklist of section 271(c)(2);
- Delays in local competition in Oklahoma are attributable not to Southwestern Bell, but to competitors dragging their feet; and
- Allowing Southwestern Bell to augment long distance competition will not only serve the public interest in it own right, but also is the best way to induce potential local providers to enter the local market in Oklahoma.

Against this backdrop of undisputed facts, the opponents of relief take two tacks. First, they would have this Commission give the OCC's determinations no weight. They do not mention that the Oklahoma Commission is the agency most familiar with local competition in its State, as Congress recognized when it vested state commissions with implementation responsibilities under sections 251 and 252 and other local competition provisions of the Act, as

well as consultative duties relating to compliance with section 271(c). They also do not mention that the Department of Justice ("DOJ") and this Commission urged state commissions to conduct full-scale proceedings on section 271 applications, just as the OCC did here. Rather, these parties ask this Commission to delay long distance entry — and thus new competition which the DOJ and nearly all other commenters accept would be in the public interest — based on allegations that Southwestern Bell somehow has violated its statutory obligations and impeded entry by new competitors.

The grievances aired by Southwestern Bell's competitors, and accepted at face value by DOJ, have already been reviewed and properly rejected. The OCC, acting at the core of its expertise and within its congressionally assigned duties under the 1996 Act, found that Southwestern Bell has met all checklist requirements and that the failure of competitors to enter the local market in Oklahoma is due to competitors' own business strategies, not any failure by Southwestern Bell. That determination, based on an extensive public record, on-site investigation, and first-hand knowledge of the relevant markets, is due great deference when this Commission assesses the same issues from afar. Certainly, DOJ — which declined to participate in the OCC's proceedings — has no basis for crediting the allegations of competitors over the findings of the OCC.

Unable to meet the OCC's determinations head-on, the opponents of relief also attempt to reargue what Congress has already decided by adding to or otherwise rewriting the statutory requirements for interLATA relief. These commenters argue either forthrightly (in the case of competitors) or indirectly (in the case of DOJ) that substantial local competition is a precondition

of Bell company in-region, interLATA entry. Opponents likewise would read Track B out of the Act and then, by requiring Bell companies to wait until every checklist item is purchased and every potential negotiating dispute resolved, make Track A virtually impossible to satisfy as well. DOJ even seeks to argue that its own preferences for operational support systems, beyond what is required by the Act or the Commission, should be an additional checklist item.

None of these strategies is consistent with the Act. Opponents always can imagine a facility or service no one has thought to request under the checklist or initiate some dispute about interconnection, network access, or resale. That is why Congress decided that such issues will not stand in the way of greater long distance competition when the local exchange has been opened as measured by the objective criteria of the checklist. Congress set out a specific test of when Southwestern Bell has sufficiently opened its local markets, and it forbade the Commission to adopt more expansive requirements.

At bottom, Southwestern Bell's opponents contend that section 271's purpose is not to promote long distance competition, but to give new entrants "leverage" to expand Southwestern Bell's local competition obligations under sections 251 and 252 for the indefinite future. Congress, however, viewed Bell company interLATA entry as an end in itself, and wanted such entry to go forward as soon as carriers have the opportunity to compete in the local exchange, as measured by the checklist. The comments of the OCC, the DOJ, and even Southwestern Bell's competitors confirm that Southwestern Bell's interLATA entry in Oklahoma would serve the public interest by promoting long distance competition. Everyone (except the long distance incumbents) accepts that entry by a new, capable competitor will tend to improve the quality and

lower the price of interLATA services, especially for ordinary residential callers. Moreover, as this Commission continues to recognize in various proceedings, concerns about possible discrimination and cost misallocation have been addressed through existing safeguards.

The Commission should accordingly adopt the OCC's recommendation, reject opponents' efforts to stifle competition, and approve Southwestern Bell's application to provide interLATA services in Oklahoma.

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SOUTHWESTERN BELL'S REPLY

Section 271 establishes three requirements for interLATA entry: (1) the existence of either an interconnection agreement that satisfies section 271(c)(1)(A) or an effective statement of generally available terms and conditions under 271(c)(1)(B); (2) compliance with the competitive checklist of 271(c)(2); and (3) a determination that entry (carried out in accordance with section 272's safeguards) would satisfy the public interest. After thorough investigation, the OCC correctly concluded that Southwestern Bell had satisfied each of these three requirements.

In various ways, opponents seek to add to these three statutory requirements by citing CLECs' delays in entering Oklahoma's local exchange. As a matter of law, CLECs' decisions to postpone providing local telephone service cannot undermine Southwestern Bell's eligibility for interLATA relief. Congress chose not to place Bell companies at the mercy of those whose interest lies in delaying Bell company interLATA entry.[1] As a factual matter, moreover, the delays in local competition in Oklahoma are attributable to opponents' "internal business" plans and operations, not to any action or inaction of Southwestern Bell. OCC Order at 3. The OCC's investigation revealed that AT&T has chosen to offer services in Oklahoma initially as a

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[1] ALTS and the DOJ claim that most CLECs "do[] not care about SBC's interLATA business" and have no reason to twist the statute or make trumped-up complaints. ALTS Ex Parte at 2-3 n.3 (May 8, 1997); DOJ at 19. They ignore that Southwestern Bell will be weakened as a local competitor if it cannot provide bundled service packages, as well as that CLECs seek to use 271 proceedings to force concessions Bell companies need not make under sections 251 and 252. ALTS' assertion that its members have no stake in interLATA entry is particularly disingenuous given the war-cry aired at ALTS' recent convention: "We must delay as long as we possibly can the RBOCs' getting into long distance." Competitive LECs Urged to Wage Drive Against Bell Long Distance, Communications Daily, at 3 (May 6, 1997) (quoting president-CEO, ICG Telecom Group).

reseller;[2] that MCI put off entering the local market in Oklahoma because of "staffing problems" and also would enter as a reseller,[3] and that Sprint wants only to enter as a reseller at some uncertain point in 1998.[4] Based on such evidence, as well as a detailed review of the operations of Brooks Fiber, Cox Communications, and others, the OCC held: "The fact that CLECs may not be utilizing each of the 14 checklist items speaks to each individual company's internal business plans and operations, not to the unavailability of the items from SWBT." OCC at 8.

These legal and factual touchstones confirm that Southwestern Bell fulfills the statutory requirements and is entitled to augment long distance competition in Oklahoma regardless of the current state of local competition and competitors' utilization of its checklist offerings.

I. THE OCC CORRECTLY DETERMINED THAT SOUTHWESTERN BELL HAS SATISFIED THE REQUIREMENTS OF SECTION 271(c)(1)

A. Brooks Fiber is a Qualifying, Facilities-Based Competitor

The OCC concluded that Southwestern Bell satisfies the requirements of subsection 271(c)(1)(A) because Brooks Fiber serves both business and residential customers and offers — through its effective intrastate tariffs — to connect business and residential customers to its own fiber-optic rings and switches. OCC at 4-6; OCC Order at 2. The OCC reached this conclusion after a full factual investigation and in its role as the agency responsible for authorizing and

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[2] AT&T's Turner ¶ 18 (Br. App. Vol. IV, Tab 21); see also AT&T's Dalton ¶ 79; AT&T's Wren ¶ 12; AT&T's President is Wasting no Time in Shaking Things Up, Wall St. J., Dec. 24, 1996, at A1 (noting plan to delay facilities-based entry and "strike resale deals" instead).

[3] Transcript of April 23 OCC Proceedings at 99 (attached to OCC Comments).

[4] Id. at 91.

regulating Brooks' intrastate services. The OCC's conclusions accord with the language of the statute, which does not require that the CLEC have any minimum number of subscribers and does not impose any requirement that the CLEC actually serve both business and residential customers over its own facilities Brief at 8-12; Opposition to ALTS at 9-13.

In response, opponents of this application contend that the statutory requirement of a "competing provide[r]" implicitly incorporates some minimum number of customers or square miles of service territory. AT&T at 8-10; Sprint at 9; Telecommunications Resellers at 6. This suggested reading is textually unsupported and refuted by Congress' rejection of proposals for a "metric" test.[5] Congress decided that such tests would delay long distance competition without any corresponding benefit to local competition, for once a facilities-based CLEC is interconnected and able to purchase network elements or services for resale, there is nothing to prevent it from expanding its operations. Brooks Fiber has done just this in Oklahoma.[6]

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[5] DOJ recognizes that "Congress rejected proposals to require BOCs to wait until various 'metric' tests of the substantiality of the competition were satisfied." DOJ at 10. AT&T, however, suggests the House may have done the opposite. AT&T at 8 & n.3. In fact, the House deleted language that would have required qualifying, facilities-based carriers to serve customers on a "comparable . . . scope" to the incumbent Bell company. See WorldCom at 19 n.30. Also, when the manager of the House bill proposed the "facilities-based" and "residential and business subscribers" tests ultimately included in the Act, 141 Cong. Rec. H8445 (daily ed. Aug. 4, 1995), and Representative Bunn proposed an alternative metric test, id. at H8454, the House tabled Bunn's amendment and adopted the language ultimately included in the Act. Id. H8454, 8459.

[6] Brooks acknowledges it is adding business subscribers "on a continuous basis" in Oklahoma. Brooks Fiber at 13 n.11. And while Brooks wishes to leave the impression that it is serving only a small number of telephone lines, the facilities ordered by Brooks and the millions of calls passed between SWBT and Brooks Fiber since January 1997 suggest otherwise. Butler Reply Aff. ¶¶ 5-7. In that regard, DOJ and others confuse customers (of which Brooks may have only a few dozen) with served lines (of which Brooks has thousands). DOJ at 57.

Opponents also contend that Brooks Fiber must actually serve both residential and business customers over its own facilities to be a qualifying carrier under subsection (A). AT&T at 6; NCTA at 10-11; Brooks Fiber at 8. As the DOJ (among others) accepts, the law says otherwise. See DOJ at 9-10, 20-21; DOJ Addendum at 2-4. "A" carriers must be "competing providers" of service to residential and business customers, but they need only "offer[]" service on a facilities basis. § 271(c)(1)(A). Brooks Fiber serves all but one of its business customers exclusively over its own facilities.[7] Brooks' tariffs also hold out an offer to serve residential customers over these same facilities. OCC at 4-6. As the OCC found, there is no technical reason why Brooks cannot fulfill this commitment. OCC Comments at 6; see Deere Reply Aff. ¶ 34. Nor is there even any economic reason, especially given that Brooks' networks run directly past a large number of apartment buildings in Tulsa and Oklahoma City.[8]

B. If Brooks Fiber Is Not a Qualifying "A" Carrier, Southwestern Bell May File Under Subsection (B)

As to Southwestern Bell's ability to file under "Track B," Southwestern Bell's position that the "such provider" language of subsection 271(c)(1)(B) refers back to a facilities-based competing provider described in subsection 271(c)(1)(A) fits with both the text and the legislative history of the Act. The opponents, by contrast, either ignore this language or offer

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[7] Some Brooks customers are served using access lines obtained from SWBT. However, the Commission has accepted that unbundled network elements ("UNEs") count as a CLEC's "own facilities," for reasons that apply equally to the access lines used, on an exclusive basis, by Brooks. Universal Service Order, No. 97-157 ¶¶ 163, 168 (May 8, 1997); Deere Reply Aff. ¶ 10.

[8] Id.; Wheeler Reply Aff. (mapping apartments). As an indication of offerings that might be attractive to residential customers, Brooks' Web site currently advertises ISDN lines for telecommuting and Internet access in Oklahoma. Ex. 19 hereto.

constructions that are flatly contrary to the words Congress used in the legislation, the Conference Report, and contemporaneous floor debate.

Opponents who bother to address the text of the Act typically say "such provider" refers to only part of subsection (A)'s description of a qualifying carrier, not including the requirement of having facilities in place.[9] The legislators who drafted this language, however, gave the phrase "such provider" its plain meaning as a reference to a facilities-based provider described in (A). Opposition to ALTS at 14-15.[10] Furthermore, the Conference Report states that a request that could close the "B Track" must come from a "facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A)." S. Conf. Rep. No. 104-230 at 148 (1996) ("Conf. Rep.") (emphasis added); id. at 147 (B Track turns on "failure of a facilities-based competitor to request access or interconnection"). Our opponents would eliminate that requirement.

Re-writing this very passage of the Conference Report, the Department maintains that a request by a "qualifying potential facilities-based competito[r]" forecloses reliance on subsection (B). DOJ at vi (emphasis added). The Department relies almost exclusively on policy

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[9] AT&T at 17; MCI at 18. Even under this incorrect reading of the law, Southwestern Bell is eligible under subsection (B) because no requesting carrier in Oklahoma — including Brooks Fiber — met the "residential and business subscribers" requirement three months before Southwestern Bell submitted its application. This requirement precedes the phrase — "for the purpose of this subparagraph" — that opponents say suspends the "such provider" language of subsection (B).

[10] If Congress had meant to refer in subsection (B) to any party requesting interconnection and access under section 251, it would not have used the word "provider." In section 251, Congress coined the phrase "requesting telecommunications carrier" to refer to a party seeking to begin negotiations, § 251(c), but referred to actual, operational CLECs as "competing providers." § 251(b)(3), (4).

arguments, to the exclusion of the language of the law and legislators' contemporaneous discussions of it. Id. at 13-18.[11] Even from a policy perspective, however, it makes perfect sense that Congress would have hinged B Track entry on the existence of an actual competing provider (judged by its facilities and services at the time of the application) rather than competitors' claimed aspirations. AT&T itself admits that "at the time a request for interconnection is made, there typically will be no way to be certain that a CLEC ultimately will provide service predominantly over its own facilities." AT&T at 18; accord ALTS Ex Parte at 4 (May 8, 1997) ("no intelligible way to perform 'gene testing'"). And even the Department recognizes "'the likelihood that entrants will combine or alter entry strategies over time.'" DOJ at 42 n.51 (quoting Local Interconnection Order). Thus, the Department would have this Commission base section 271 determinations on the unverifiable, fluctuating plans of parties who have an incentive to color their supposed intentions to block Bell company interLATA entry.

Opponents never dispute that their approach would invite CLECs to preclude use of the B Track by asking for interconnection and making exaggerated claims about their plans for facilities-based service. They argue, however, that subsection (B) is saved from irrelevance

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[11] Because its interpretation of Track B is in direct conflict with detailed explanatory statements of congressional intent cited by Southwestern Bell (including the floor statements of Representative Hastert (an author of the language) and Representative Tauzin), DOJ never deals directly with the legislative history. Instead, it offers phrases from the Conference Report indicating that Congress viewed "such providers" as potential competitors to Bell companies. DOJ at 16-17. This language simply reflects a belief that CLECs would be full competitors in the local market only after they implement interconnection agreements under section 251. It is consistent with Congress' understanding that — while there was facilities-based local entry before the 1996 Act — the Act's provisions were necessary to allow CLECs to engage in "meaningful . . . competition." Conf. Rep. at 148.

because it contains an exception that allows a Bell company to proceed down Track B when all "such providers" in the State can be shown to have acted in bad faith (particularly by failing to follow their agreements' implementation schedules). E.g., AT&T at 12-13.[12] This proposal to balloon an exception that is not even mentioned in the Conference Report while gutting the core of subsection (B) is absurd for two reasons. First, the 1996 Act (unlike section 242(a)(1) of the House bill) does not require carriers to commit to a timetable for deploying facilities in a voluntarily negotiated agreement. Accordingly, in SWBT's region at least, there are no implementation schedules that could be enforced through the bad-faith provision. Second, even if SWBT were to slow local competition by forcing CLECs to arbitrate implementation schedules under section 252(c)(3), state regulators would then have to decide upon a business plan for each CLEC. Aware that this would contravene Congress' design for a "de-regulatory national policy framework," Conf. Rep. at 1, state commissions likely would adopt very general schedules that leave CLECs substantial latitude to delay Bell company interLATA entry by "working toward" a professed "goal" of becoming a facilities-based carrier at a painfully slow pace. DOJ at 18. This, of course, is the tactic of AT&T, MCI, and Sprint in Oklahoma.

There also is no support for assertions that Congress crafted an essentially meaningless B Track to drive Bell companies to the A Track. The Conference Report explains that the absence of a request by a "facilities-based competitor that meets the criteria set out in section

[12] In addition, the DOJ alleges that Southwestern Bell's construction of subsection (B) "would essentially read Track A out of the statute." DOJ at 16. Southwestern Bell has identified various situations in which the A Track would apply as intended by Congress, Opposition to ALTS at 16-17, including the facts of this very application.

271(c)(1)(A)" is sufficient justification for interLATA entry under subsection (B). Conf. Rep. at 148. The House Committee Report, which opponents wrongly hold out as more authoritative than discussions of the final Act, see, e.g., ALTS Ex Parte at 3 n.4; MCI at 19, likewise backs Southwestern Bell's position. It makes clear that while the House committee hoped for local entry by facilities-based competitors, it drafted subsection (B) to ensure that a Bell company "is not penalized in terms of its ability to obtain long distance relief" because it has received no request from a "facilities-based competitor which meets the criteria specified in the Act." H.R. Rep. No. 104-204, at 77 (1995) ("House Rep.").

It is argued that allowing Bell companies to rely on a statement of generally available terms and conditions to satisfy section 271(c)(1) would release them from the duty to negotiate in good faith with potential competitors that do not have facilities in place and do not serve business and residential customers. E.g., DOJ at 13-14, 17; NCTA at 9; MCI at iv. This is false. SWBT's duty to negotiate springs from section 251, not section 271, and that obligation must be met regardless of interLATA relief. See OCC at 10; Zamora Reply Aff. ¶ 4.

Moreover, while the A Track reflects Congress' hope that cable companies or other operational, facilities-based competitors would "negotiate the loop for all within a State," Congress did not attach the same significance to negotiations with carriers having only vague plans someday to become facilities-based providers. 142 Cong. Rec. H1149 (daily ed. Feb. 1, 1996) (statement of Rep. Fields). Congress believed local markets could be opened even more effectively through a statement of generally available terms and conditions, which (unlike negotiated agreements) must comply with sections 251 and 252(d). Statements were at the heart

of the House approach to local competition, which was largely incorporated into the final legislation. See House Rep. at 76; Conf. Rep. at 146, 147. Yet, if the opponents' view of the Act were accepted, Bell companies would have no practical ability to use a statement to satisfy section 271. This would remove any incentive to initiate opening of the local exchange through a statement, as SWBT has done in Oklahoma. Local competition (particularly by carriers lacking resources to negotiate an agreement from scratch) would be slowed. See OCC at 11.

II. THE OCC CORRECTLY DETERMINED THAT SOUTHWESTERN BELL HAS SATISFIED THE REQUIREMENTS OF SECTION 271(c)(2)

The OCC explained that both its extensive investigation into Southwestern Bell's section 271 application and its year of experience implementing the 1996 Act — including Southwestern Bell's successful negotiations with competitors and the absence of formal complaints from CLECs — showed that Southwestern Bell is in compliance with statutory requirements. OCC at 8. The OCC also observed that no party has ever claimed that it was unable to obtain a required checklist element from SWBT after making a request. Id. Rather, arguments against Southwestern Bell's checklist compliance rested upon speculative objections by companies (specifically including AT&T, MCI, and Sprint) that have never attempted to order checklist items in Oklahoma. Id. These objections, the OCC found, have been or would properly be resolved through arbitration proceedings or the cooperative implementation process (backed by the possibility of OCC enforcement). OCC at 8-10; Graves Comments at 2-3. The state commission was correct on the law and on the facts.

A. Southwestern Bell Need Not Wait for Competitors to Order Every Checklist Item

In construing the requirements of the checklist, the OCC found that "no particular quantity or quality level of competition must be reached before SWBT [can] be found to meet the requirements of Section 271(c)" and, in particular, competitors need not have decided to utilize each checklist item. OCC Order at 2. The DOJ agrees that actual usage of checklist items is not required. DOJ at 22-23. That is plainly correct.

Southwestern Bell certainly need not show that checklist items have been ordered and used insofar as it relies on subsection 271(c)(1)(B), which is triggered by an absence of competition and a general offering of terms and conditions through a statement. Moreover, assuming counterfactually that Southwestern Bell could not rely upon subsection (B), there still would be no basis for the claim that 271 relief must wait until CLECs decide to purchase each checklist item from SWBT. OCC Order at 2. Given Congress' expectation that Bell company entry under subsection A could be "immediate[],"[13] the Act's design to promote parallel local and interLATA entry as soon as possible, and Congress' refusal to hinge interLATA relief upon CLECs' business decisions, Congress could not have intended to delay Bell company interLATA entry until multiple CLECs collectively request and purchase just the right combination of items. Southwestern Bell Br. at 16-17.[14]

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[13] 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux).

[14] Brooks Fiber's operations illustrate the absurdity of the position that CLECs must take every checklist item. Brooks uses T-1 lines that are identical in every material respect to T-1 facilities SWBT offers Brooks as unbundled loops. See Deere Reply Aff. ¶ 10; Brooks Fiber at 16 (T-1s "analogous" to loop and transport facilities). Brooks states that it is taking the T-1s via

Indeed, Congress specifically anticipated that a Bell company could proceed on the basis of an interconnection agreement with a facilities-based carrier that does not need all checklist items. Legislators drafted "Track A" particularly with cable in mind,[15] yet they knew many cable companies would not buy unbundled loops. House Rep. at 77 ("cable industry . . . has wired 95% of local residencies . . . and thus has a network"); Conf. Rep. at 148 (same). Thus, opponents' construction of the checklist would require this Commission to deny applications Congress specifically wanted approved.

The text of the Act confirms that a Bell company may fulfill "Track A" by binding itself to furnish an interconnected, facilities-based CLEC with network access that includes all of the checklist items. Section 271(d)(3)(A)(i) provides that a Bell company that relies upon Track A must "fully implemen[t] the competitive checklist" by providing access and interconnection to competitors pursuant to approved interconnection agreement(s). The checklist, in turn, requires that "[a]ccess . . . provided or generally offered by a Bell operating company" must include each of the checklist items, many of which are themselves phrased as "access" to particular facilities or services. § 271(c)(2)(B). Finally, section 271(c)(1)(A) requires the Bell company to "provid[e] access and interconnection to its network facilities for the network facilities" of a

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SWBT's access tariff, rather than as UNEs, because of its chosen network configuration and "plans." Brooks Fiber at 10. AT&T says Brooks is buying T-1s this way because the access tariff's rate is lower. AT&T's Turner ¶ 43 (Br. App. Vol. IV, Tab 21). Either way, Brooks' strategy confirms that competitors will order UNEs when their own business plans require, not necessarily when the UNEs are available.

[15] See Conf. Rep. at 148 (cable companies would provide "the sort of local residential competition that has consistently been contemplated"); House Rep. at 77; 142 Cong. Rec. H1145, 1149 (daily ed. Feb. 1, 1996) (Statement of Rep. Fields).

competing facilities-based provider; Congress explained that this is a test of whether "the competitor has implemented the agreement and the competitor is operational."[16] Collectively, these provisions simply require that the Bell company provide access to every checklist item under an implemented agreement with an operational competitor.[17]

Several opponents argue that this interpretation of the Act merges "providing" access through an implemented agreement with "offering" access through a statement of terms and conditions. AT&T at 11, 13; Sprint at 17. They ignore the steps that must be taken to convert a general offering into a specific provision of access. A statement serves as a starting point for customized arrangements and as a compilation of standard terms that any CLEC may choose to include in a contract without negotiation. In order to "provide" access, however, the Bell company must allow the CLEC to establish both its legal right to checklist items (through negotiation and/or arbitration and state approval of the resulting agreement under section 252), and its practical ability to order those items (through interconnection).

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[16] Conf. Rep. at 148. Because interconnection and resale agreements entitle CLECs to obtain facilities and services but do not force CLECs to purchase items potentially available to them, "implementing" an agreement could not entail specific purchase requirements.

[17] As Representative Paxon explained, "the legislation would not require the Bell operating company to actually provide every item to a new competitor under the agreement contemplated in section 271(c)(1)(A)." Rather, "[w]here the Bell operating company has offered to include all of the checklist items in an interconnection agreement and has stated its willingness to offer them to others, the Bell operating company has done all that can be asked of it." 142 Cong. Rec. E261-62 (daily ed. Feb. 29, 1996) (extending Feb. 1 remarks).

B. The Department of Justice's Approach Is Unfounded as a Matter of Law and Fact

The DOJ's evaluation of Southwestern Bell's checklist compliance is fundamentally flawed. While the DOJ agrees there is no de jure requirement that a Bell company actually furnish all checklist items, DOJ at 22-23, it attempts to impose such a requirement de facto. Under the DOJ's circular view, Southwestern Bell cannot as a practical matter demonstrate its ability to supply checklist items except by supplying them.[18] This approach is no different in substance than the one urged by the Bell companies' competitors and rejected by the Department itself, for it would impermissibly extend the checklist by adding new local competition "pre-conditions," DOJ's Schwartz ¶ 17, for interLATA entry.

Although this legal issue lies at the heart of Southwestern Bell's disagreement with the Department of Justice, the Department has erred in additional respects as well. Rather than deferring to the OCC's on-site investigation, which was conducted using the procedures urged by the DOJ and which addressed local issues uniquely familiar to the OCC, the Department accepts at face value the very competitors' complaints that were rejected by the OCC. Then, to explain its preference for the allegations of interested parties over the conclusions of the expert agency, the Department actually denies that competitors have any interest in obstructing Southwestern Bell's entry into interLATA services. DOJ at 19; see supra n.1.

The legal and factual errors reflected in the Department of Justice's evaluation are fully discussed in Attachment A to this Brief ("Response to DOJ"). As for the law, DOJ adds specific

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[18] E.g., DOJ at 43-44, 49, 53 (loops), 54, 57 (drawing inference from number of Brooks customers), 81 (OSS interfaces).

new duties regarding OSS access and performance standards that are not found in the Act or in this Commission's rules and are beyond the DOJ's expertise and authority. Id. at 9-14. Then, under the rubric of the public interest, the Department adds further requirements. Although nominally aimed at showing "irreversibly open markets," these requirements, as noted above, in fact require actual competition. Id. at 12. That is impermissible under the Act, but also directly contrary to the Department's proper purpose of promoting competition, as the Reply Affidavit of Alfred Kahn and Timothy Tardiff ("Kahn Aff.") explains. Id. ¶¶ 59-65.

As for methodology, the Department conducted its evaluation largely outside the antitrust area where Congress intended DOJ to exercise its expertise and discretion. Response to DOJ at 6-8 (discussing congressional directive). Nor did the Department undertake the sort of investigation Congress expected when it gave DOJ a special role. When accepting competitors' allegations as proof of supposed misconduct by Southwestern Bell, DOJ never even acknowledges responses that the OCC found persuasive after its on-the-ground investigation. Id. at 15-26. And in the one area where the DOJ staff did investigate SWBT's checklist compliance first-hand — OSS access — DOJ reported no specific problems or proposed changes to SWBT and in fact praised SWBT for being ahead of other BOCs. Ham (OSS) Reply Aff. ¶¶ 39-41.

As a result of its limited investigation, the Department has misunderstood and misstated fundamental facts about Southwestern Bell's provision of access to OSSs, interim number portability, collocation, and other checklist items. Response to DOJ at 18-26. It has demonstrated why Congress wanted this Commission to give "substantial weight" strictly to the DOJ's views on matters within its antitrust expertise. Id. at 6-8; infra n.32; see § 271(d)(2)(A).

When the DOJ steps outside its assigned role and area of specialized knowledge, this Commission should give it no deference — substantial or otherwise.

C. As the OCC Concluded After Full Investigation, Southwestern Bell Satisfies All of the Checklist Requirements

The OCC knew from its experience and investigation that, due to their own business plans, competitors who complain about the availability of particular checklist items almost invariably "have not even attempted to obtain" the items they say they cannot have. OCC at 8. It further noted that no party has ever presented this Commission or the OCC with a formal objection that it was unable to obtain a checklist item from SWBT, OCC at 9, and no party other than AT&T (which has not completed a single agreement without arbitration) has arbitrated a negotiation dispute with SWBT.

For these very reasons, some competitors attack Southwestern Bell's checklist compliance by throwing out any and all grievances, in the hope some will stick. They raise general issues arising under the Act that will properly be resolved in other proceedings;[19] seek preemption of

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[19] For example, although they have presented the issue to a district court and the Commission in separate proceedings, DOJ at 65 n.83, MCI and AT&T nonetheless argue SWBT's application should be denied because SWBT supposedly does not allow access to UNEs that are subject to intellectual property licenses. MCI at 12 n.4; AT&T at 23. This claim is not only improperly presented, but also patently false. As briefed in the state and federal proceedings, SWBT has not refused access to UNEs. Rather, SWBT requires that CLECs assume liability for license violations that arise from their own misuse of third parties' intellectual property. See Statement § XV(A)(6)-(7); Deere Reply Aff. ¶ 9. This is a reasonable requirement, id., and if the DOJ is right that third parties have no rights that could be enforced against CLECs, DOJ at 64-65, it imposes little if any burden on CLECs. For other attempts to drag in issues that should be resolved elsewhere, see Paging Alliance at 2 (reciprocal compensation) and at 5 n.19 (conceding that Southwestern Bell submitted the issue to the Commission), as well as WorldCom at 43 (urging Commission to "establish a date by which it will set OSS standards if none are developed by the industry").